Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers

HIGH COURT (PENANG) — CIVIL APPEAL NO 11-25-1995
ABDUL HAMID J
17 JUNE 1996

Evidence *— Documentary evidence — Admissibility of — Evidence Act 1950 s 73A(1) & (2)*

The plaintiff, a licensed merchant bank, sued the defendant, a firm, based on a factoring agreement dated 12 March 1985. At the hearing one Simon a/l Jones Ganesh, an officer of the plaintiff ('the officer'), gave evidence and wanted to tender the agreement. On behalf of the plaintiff, the agreement was signed by one Dr Junid and one Dr Cheah Teoh Keong, a managing director. The document was kept by the bank. It was the officer's duty to provide information regarding accounts of clients who failed to repay the plaintiff. Dr Junid, who had knowledge of the document, had left the plaintiff. Dr Cheah, on the other hand, could not come to the Magistrate's Court, Bukit Mertajam from Kuala Lumpur as he was a busy man. The defendant objected to the tendering of the agreement. The learned magistrate ruled that the agreement was not admissible and adjourned the case sine die for the plaintiff to appeal. The plaintiff appealed and the issue concerned the admissibility of the document and the interpretation of s 73A of the Evidence Act 1950 ('the Act').

Held, allowing the appeal:

(1) A magistrate should not adjourn a hearing sine die every time he makes a ruling on an objection to the admissibility of a document or a statement, or for that matter preliminary objections on so-called points of law. The learned magistrate should have proceeded with the trial and decided the case once and for all. That would have saved cost and time (see p 536E).

(2) Under s 73A of the Act, a statement was admissible under three circumstances, namely: (i) where the maker of the statement was called to give evidence; (ii) where the maker was not available but the proviso to sub-s (1) of s 73A was satisfied; and (iii) where the maker was available but was not called as a witness under the circumstances provided by sub-s (2) of s 73A (see p 535E).

(3) Subsections (1) and (2) of s 73A of the Act are separate. The proviso therefore was applicable only to sub-s (1) and not to sub-s (2) of s 73A of the Act (see p 535F).

(4) Under sub-s (2) of s 73A of the Act, a statement was admissible if the court was satisfied that undue delay or expense would be caused in order to call the maker to give evidence. The circumstances of this case justified the agreement to be admitted under sub-s (2) of s 73A of the Act. Dr Cheah himself had come

A to Bukit Mertajam from Kuala Lumpur five or six times for the same case. The claim was only for a sum of RM5,425.82 while the costs incurred by the plaintiff were more than what it was claiming (see p 536A–C).

B **[Bahasa Malaysia summary**

Plaintif, sebuah bank saudagar berlesen, telah mendakwa penentang, sebuah firma, berdasarkan suatu perjanjian pemfaktoran bertarikh 12 Mac 1985. Semasa perbicaraan, seorang bernama Simon a/l Jones Ganesh, seorang pegawai bank plaintif ('pegawai tersebut'), telah memberi keterangan dan ingin mengemukakan perjanjian tersebut. C Bagi pihak plaintif, perjanjian telah ditandatangani oleh seorang bernama Dr Junid dan seorang bernama Dr Cheah Teoh Keong, yang merupakan seorang pengarah urusan. Dokumen tersebut telah disimpan oleh pihak plaintiff. Adalah menjadi tugas pegawai tersebut untuk memberi maklumat tentang akaun-akaun klien yang gagal D membayar balik pinjaman mereka. Dr Junid yang mempunyai pengetahuan mengenai dokumen tersebut telah meletak jawatan. Dr Cheah pula tidak dapat hadir di Mahkamah Majistret Bukit Mertajam dari Kuala Lumpur kerana terlalu sibuk. Defendan membantah terhadap pengemukaan perjanjian tersebut. Majistret yang arif telah memutuskan bahawa perjanjian tersebut tidak boleh diterima masuk E dan telah menangguhkan kes tersebut sine die untuk membolehkan plaintif merayu. Plaintif telah merayu dan isu adalah berkenaan penerimaan masuk dokumen tersebut dan tafsiran s 73A Akta Keterangan 1950 ('Akta tersebut').

F **Diputuskan**, membenarkan rayuan:

(1) Seseorang majistret tidak patut menangguhkan sesuatu perbicaraan sine die setiap kali beliau membuat keputusan mengenai bantahan atas kebolehterimaan sesuatu dokumen atau pernyataan, ataupun bantahan awal atas isu undang-undang. G Majistret yang arif sepatutnya meneruskan perbicaraan dan memutuskan kes tersebut sekaligus. Ini akan menjimatkan kos dan masa (lihat ms 536E).

(2) Di bawah s 73A Akta tersebut, sesuatu pernyataan boleh diterima masuk di bawah tiga keadaan, iaitu: (i) di mana pembuat H pernyataan dipanggil untuk memberikan keterangan; (ii) di mana pembuat pernyataan itu dapat memberikan keterangan tetapi proviso kepada s 73A(1) telah dipenuhi; dan (iii) di mana pembuat dapat memberi keterangan tetapi tidak dipanggil sebagai saksi di bawah keadaan yang diperuntukkan oleh s 73A(2) (lihat ms 535E).

(3) Seksyen kecil (1) dan (2) s 73A Akta tersebut adalah berasingan. I Maka proviso hanya terpakai kepada seksyen kecil (1) dan bukan seksyen kecil (2) s 73A Akta tersebut (lihat ms 535F).

(4) Di bawah seksyen kecil (2) s 73A Akta tersebut, sesuatu pernyataan boleh diterima masuk jikalau mahkamah berpuas hati bahawa kelengahan atau perbelanjaan tak wajar akan berlaku

sekiranya pembuat pernyataan tersebut dipanggil untuk memberi keterangan. Keadaan kes ini memberi justifikasi kepada penerimaan masuk perjanjian tersebut di bawah s 73A(2) Akta tersebut. Dr Cheah sendiri telah datang ke Bukit Mertajam dari Kuala Lumpur sebanyak lima atau enam kali untuk kes yang sama ini. Tuntutan ini hanyalah untuk jumlah sebanyak RM5,425.82 manakala kos yang ditanggung oleh plaintif adalah melebihi jumlah yang dituntutnya (lihat ms 536A–C).]

Legislation referred to

Evidence Act 1950 s 73A(1), (2)

Chan Siew Cheong (*Kumar Jaspal Quah & Aishah*) for the appellant.
Leong Sing Cheong (*Chen Leong & Co*) for the respondent.

Abdul Hamid J: The plaintiff ('the appellant') is a licensed merchant bank in Kuala Lumpur. The defendant ('the respondent') is a firm. The appellant's claim against the respondent is based on a factoring agreement dated 12 March 1985. At the hearing, one Simon a/l Jones Ganesh, an officer of the appellant, gave evidence. He wanted to tender the agreement. It was objected to by learned counsel for the respondent. After recording further evidence and hearing arguments by both learned counsel on s 73A of the Evidence Act 1950 ('the Act'), the learned magistrate ruled that the agreement was not admissible. He then adjourned the case sine die for the appellant to appeal to this court.

This appeal only concerns the admissibility of the agreement.

However, first, I would like to say that in my view the learned magistrate should have proceeded with the trial and decided the case once and for all. That would have saved cost and time.

Now, coming to the issue before me. Section 73A of the Act provides:

> 73A *Admissibility of documentary evidence in civil cases, etc*
>
> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either:
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

A (b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

B

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s (1) shall be admissible as evidence or may, without any such order having been made, admit such a

C statement in evidence:

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or

D of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

Under the section, a statement is admissible under three circumstances:

(1) where the maker is called to give evidence — s 73A(1)(i);

E (2) where the maker is not available but the proviso to sub-s (1) of that section is satisfied; and

(3) where the maker is available but not called as a witness, under circumstances provided by sub-s (2) of that section.

F It should be understood that that sub-s (2) is separate from sub-s (1). Under sub-s (1), the statement is not admissible unless:

(a) the maker himself gives evidence; or

(b) the proviso applies.

G The proviso is a proviso to sub-s (1) and not to sub-s (2). So, if the statement is not admissible under sub-s (1), the learned magistate should have considered whether it was admissible under sub-s (2). Under sub-s (2), the statement is admissble if the court is satisfied that undue delay or expense would be caused in order to call the maker to give evidence.

H With respect, it appears to me that the learned magistrate only considered sub-s (1) and not sub-s (2).

Would the agreement be admissible under sub-s (2)? We will have to revert to the facts.

The plaintiff is a merchant bank. The document in question is an agreement between the bank and another company. On behalf of the bank,

I it was signed by one Dr Junid and one Dr Cheah Teoh Keong, a managing director. PW1, through whom the agreement was sought to be tendered, is an officer of the bank. It is his duty to provide information regarding accounts of clients who fail to repay the bank. The document is kept by the

bank. He has knowledge of the document. Dr Junid has left the bank. Dr Cheah could not come to the Magistrate's Court, Bukit Mertajam (from Kuala Lumpur) as he is a busy man. He himself had come to Bukit Mertajam (from Kuala Lumpur) five or six times for the same case. It should be noted that the claim was only for a sum of RM5,425.82. He said that the costs incurred by the plaintiff were more than what the plaintiff was claiming.

That is the scenario. I am of the view that this was the type of circumstances that s 73A(2) was enacted to serve. That intention is clearly to avoid undue delay or expense of requiring, in this case, the signatory who has left the bank or the managing director to be personally present in court just to produce the agreement. What more when the suit is in Buklt Mertajam, the office of the plaintiff is in Kuala Lumpur and the claim is only RM5,425.82; and even the officer has had to make five or six trips already.

I am of the view that the circumstances of this case justify the agreement to be admitted under sub-s (2) of s 73A of the Act.

I allowed the appeal and remitted the case back to the learned magistrate to proceed with the trial to the end.

I hope that the magistrate will take note and, in future, not adjourn a hearing sine die every time he makes a ruling on an objection to the admissibility of a document or a statement, or for that matter preliminary objections on so-called points of law. Such appeals are causing delay in the disposal of cases and causing cases to be pending for years, resulting in the public losing confidence in the courts. Furthermore, such appeals will only add up to the costs of the suit, which may be more than the amount claimed.

Appeal allowed.

Reported by Kanesh Sundrum